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Burning Tree Club, Inc. v. Bainum - State Action, Strict Scrutiny, and the "New Judicial Federalism"

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Note

BURNING TREE CLUB, INC. v. BAINUM—STATE ACTION, STRICT SCRUTINY, AND THE "NEW JUDICIAL FEDERALISM"

In the past fifteen years a great deal has been written about the revitalization of state constitutional law.[1] This "new judicial federalism"[2] has acquired significance because of the unwillingness of the United States Supreme Court, in recent years, to expand the scope of rights available under the federal constitution.[3] Litigants increasingly have used their state constitutions and courts to obtain greater protection of their rights.[4] Commenting on this turn of events, Justice Brennan recently said that "[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important develop-

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1. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi (Winter 1985); Countryman, *The Role of a Bill of Rights in a Modern Constitution: Why a State Bill of Rights*, 45 WASH. L. REV. 453, 454 (1970); Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157 (1979); Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Williams, *Symposium: The Emergence of State Constitutional Law: Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1191 (1985).

2. Tarr & Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919, 920 (1982).

3. *Id.* at 925.

4. R. Collins, P. Galie & J. Kincaid, STATE HIGH COURTS, STATE CONSTITUTIONS, AND INDIVIDUAL RIGHTS LITIGATION SINCE 1980: A JUDICIAL SURVEY, 16 PUBLIUS: THE JOURNAL OF FEDERALISM 141 (Summer 1986). This litigiousness has led to a debate over what the appropriate role of state constitutional law is in a federal system. Advocates of the "primacy" model believe that state constitutional law should develop independently of federal models and that state constitutional questions should be resolved before federal constitutional questions are considered. The "interstitial" model sees state constitutional law in the much more limited role of "filling in the spaces left open by federal constitutional doctrine . . . ." Note, *supra* note 1, at 1332, 1356. *See also* Comment, *The Utah Supreme Court and the Utah State Constitution*, 1986 UTAH L. REV. 319; Deukmejian & Thompson, *All Sail And No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 996-1009 (1979); Linde, *supra* note 1; Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

ment in constitutional jurisprudence of our times."[5]

The development of state constitutional law in the area of gender discrimination has been especially pronounced.[6] In the absence of an Equal Rights Amendment (ERA) to the federal constitution,[7] many of the seventeen states which have "little ERAs"[8] have interpreted their ERAs more broadly than they might have with an ERA provision in the federal constitution.[9]

In 1972 the Maryland legislature adopted, and the voters approved, Maryland's ERA, which states: "Equality of rights under the law shall not be abridged or denied because of sex."[10] The leading ERA case in Maryland is *Burning Tree Club, Inc. v. Bainum*.[11] In *Burning Tree*, the court of appeals examined a state statute that denied preferential tax treatment to country clubs that discriminate on the basis of race, color, creed, sex, or national origin, but which created an exception for country clubs "operated with the primary purpose . . . to serve or benefit members of a particular sex."[12] A majority of the court of appeals held that the exception, the so-called "primary purpose" provision violated Maryland's ERA.[13] The court, however, also decided that the "primary purpose" provision was not severable from the broader anti-sex discrimination language of the

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5. National Law Journal, Sept. 29, 1986, at S-12 (quoting Aug. 8, 1986 speech in New York).

6. *See* Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL'Y REV. 144 (1984); Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086 (1977); Tarr & Porter, *supra* note 2; Williams, *supra* note 1.

7. The language of the proposed federal amendment was: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). The amendment was adopted by a joint resolution of Congress on March 22, 1972. S.J. Res. 8, 92d Cong., 2d Sess. (1972). In 1978 Congress extended the time limit for ratification until June 30, 1982. H.J. Res. 638, 95th Cong., 2d Sess. (1978), 126 CONG. REC. 34,281, 34,314-15 (1978).

An identical amendment was introduced in the House on January 3, 1983, but on November 15, 1983, it failed to achieve the necessary 2/3 majority. *See* H.R.J. Res. 1, 98th Cong., 1st Sess., 129 CONG. REC. H46 (daily ed. Jan. 3, 1983); H.R.J. 1, 98th Cong., 1st Sess., 129 CONG. REC. H9865-66 (daily ed. Nov. 15, 1983).

8. Alaska, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. The texts of these states' ERAs (except New Hampshire's) are collected in Comment, *supra* note 6 at 1111-12. For New Hampshire's ERA, see N.H. CONST. pt. 1, art. 2.

9. *See infra* note 83.

10. MD. CONST. DECL. OF RTS. art. 46.

11. 305 Md. 53, 501 A.2d 817 (1985).

12. MD. ANN. CODE art. 81, § 19(c)(4) (1980).

13. 305 Md. at 80, 501 A.2d at 830.

statute.[14] Thus, the immediate effect of the decision was to allow Burning Tree Club (Burning Tree) to continue both excluding women and receiving the preferential tax assessment. Nevertheless, the significance of the *Burning Tree* decision lies in its application of the ERA. It is the court's most recent holding on the ERA, and the first case in which the court has discussed the "state action" requirement in the ERA context.

Although Maryland often has been grouped with Washington and Pennsylvania as states applying an "absolute standard" to sex-based classifications,[15] this note concludes that Maryland wisely joined the majority of courts in ERA states[16] by adopting the strict scrutiny standard. In rejecting the federal courts' "intermediate standard" of scrutiny[17] for sex-based classifications and the "absolute standard," Maryland has adopted a relatively clear, workable test for applying Maryland's ERA.

On the issue of state action, Maryland, like most states, has adhered closely to state action standards borrowed from federal equal protection analysis.[18] This note contends, however, that in ERA cases the Maryland Court of Appeals should advance the "new judicial federalism" by crafting a state action standard broader than that used by the federal courts.

Before looking at how the *Burning Tree* court applied the ERA, this note will describe the background and current status of the state action requirement and of the various levels of scrutiny, both in the federal courts and in Maryland and other state courts at the time of the *Burning Tree* decision. It will describe the debates over the state action and absolute scrutiny issues. Then it will discuss the *Burning Tree* decision and what that decision signals for Maryland's future on these issues. Finally, it will suggest the course the Maryland courts should follow.

I. BACKGROUND

A. State Action

For the most part, the federal constitution limits only governmental conduct and does not proscribe the conduct of private enti-

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14. *Id.* at 84, 501 A.2d at 832-33.

15. *See infra* notes 120-121 and accompanying text.

16. For the purposes of this article, "ERA states" refers to those states which have an ERA provision in their state constitution.

17. *See infra* notes 79-82 and accompanying text.

18. *See infra* notes 58-62 and accompanying text.

ties.[19] Since 1883 when the Supreme Court held in *The Civil Rights Cases*[20] that the fourteenth amendment prohibited only "state action" and not the actions of private parties,[21] federal equal protection analysis has required a determination of whether a challenged activity involves the government sufficiently to qualify as "state action."[22] The degree of state involvement which should be required has been a topic of some debate.[23]

Through the 1960s the Supreme Court's view of state action was sometimes quite broad. In *Shelley v. Kraemer*,[24] for example, the Court held that state court enforcement of a racially restrictive covenant constituted "state action."[25] In *Burton v. Wilmington Parking Authority*[26] the Court held that a restaurant leasing space from a state government was a state actor for fourteenth amendment purposes.[27]

In 1972, during the Burger era, the Court began a retrenchment in the "state action" area.[28] In *Moose Lodge v. Irvis*,[29] the Court held that a segregated club operating with a state-issued and regulated liquor license was not a state actor for fourteenth amendment

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19. *But see* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (the thirteenth amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."). *See also* Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (the right of interstate travel is "assertable against private as well as governmental interference"); *Ex parte* Yarbrough, 110 U.S. 651, 665-66 (1884) (citizens had a cause of action under the Constitution against private individuals who interfered with their exercise of their right to vote in federal elections).

20. 109 U.S. 3.

21. *Id.* at 11. One commentator points out that the fourteenth amendment state action requirement actually was stated prior to The Civil Rights Cases, 109 U.S. 3, in Virginia v. Rives, 100 U.S. 313, 318 (1879), and United States v. Cruikshank, 92 U.S. 542, 554-55 (1875). Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 507-08 & 508 n.17 (1985).

22. "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

23. *See infra* notes 44-52 and accompanying text.

24. 334 U.S. 1 (1948).

25. *Id.* at 20.

26. 365 U.S. 715 (1961).

27. *Id.* at 724-25.

28. One commentator writing in 1979 stated, "it is on the topic of state action that one can find the clearest area of conservatism on the part of the Burger Court and the most unqualified reversal of position from that adhered to by the Burger Court's predecessor." J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1978-1979, at 265 (1979).

29. 407 U.S. 163 (1972).

purposes.[30] The Court reasoned that since Pennsylvania's liquor licensing scheme was not designed to encourage discrimination, discriminatory clubs that obtain licenses are not state actors.[31] The Court also held, however, that a Pennsylvania Liquor Control Board regulation requiring all licensees to adhere to all the provisions of their constitution and by-laws was impermissible state action when applied to a club whose constitution or by-laws required racial discrimination.[32] In *Jackson v. Metropolitan Edison Co.*[33] the Court held that a regulated utility company, with a state-granted partial monopoly, was not a state actor subject to the fourteenth amendment.[34]

In 1982 the Supreme Court's reluctance to find state action continued. In *Blum v. Yaretsky*[35] the Court held that a nursing home's transfer of some of its patients was not state action for fourteenth amendment purposes even though the nursing home received Medicaid payments from the state.[36] The Court reasoned that state action was not involved because the state was not "*responsible* for the specific conduct" at issue.[37] Similarly, in *Rendell-Baker v. Kohn*,[38] the Court held that a private school, which received ninety percent of its operating budget from public sources, was not a state actor when it fired several of its employees.[39] The Court stated that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[40] In *Lugar v. Edmondson Oil Co.*,[41] however, the Court found state action present where private creditors invoked a prejudgment attachment statute which required the participation of state officials.[42] Although the Court found state action in *Lugar*, at least one commentator suggests that in *Lugar* the Court actually may be "tightening the state action requirement" by requiring the plaintiffs to show both "the existence of a relevant state policy and the involvement of state actors."[43]

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30. *Id.* at 171-72.
31. *Id.* at 176-77.
32. *Id.* at 178-79.
33. 419 U.S. 345 (1974).
34. *Id.* at 358.
35. 457 U.S. 991 (1982).
36. *Id.* at 1003-05.
37. *Id.* at 1004 (emphasis in original).
38. 457 U.S. 830 (1982).
39. *Id.* at 841-42.
40. *Id.* at 841.
41. 457 U.S. 922 (1982).
42. *Id.* at 942.
43. Comment, *The Supreme Court 1981 Term*, 96 HARV. L. REV. 1, 242-44 (1982).

A number of commentators have urged that courts should dispense with the "state action" doctrine entirely.[44] They argue that the state action doctrine is incoherent[45] and that it is based on an "anachronistic premise" in which the common law protects individuals from "infringements of their rights by private actors."[46] They reject the view "that state action is needed to protect a zone of private autonomy and to safeguard state sovereignty."[47]

Proponents of the state action requirement respond by arguing that a state action requirement is inherent in any constitutional provision;[48] that state action requirements protect a zone of personal autonomy;[49] that requiring state action helps preserve state autonomy;[50] that "constitutionalizing private law" would hamper legislative and common-law responses to social issues[51] and would produce disrespect and fear of the Constitution.[52]

Like the language of the fourteenth amendment[53] and the language of the unenacted federal ERA,[54] some of the state ERAs[55] explicitly incorporate a state action requirement. The language of Maryland's ERA, however, is not as suggestive. It states, "Equality of rights under the law shall not be abridged or denied because of sex."[56] Some commentators have suggested that this language does not mandate any state action requirement.[57]

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44. Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982).

45. Black, *supra* note 44.

46. Chemerinsky, *supra* note 21, at 506.

47. *Id.*

48. *See* Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 WILLAMETTE L. REV. 445, 447 (1986) (suggesting that state action is a "fundamental premise of a bill of rights").

49. *See* Chemerinsky, *supra* note 21, at 506.

50. *Id.*

51. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U.L. REV. 558, 566 (1985).

52. *Id.* at 569-70.

53. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

54. *See supra* note 7.

55. *See, e.g.*, COLO. CONST. art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."); HAW. CONST. art. I, § 3 ("Equality of rights under the law shall not be denied or abridged by the State on account of sex.").

56. MD. CONST. DECL. OF RTS. art. 46.

57. Comment, *The Maryland Equal Rights Amendment: Eight Years of Application*, 9 U. BALT. L. REV. 342, 369 (1980). In Heins, *"The Marketplace and the World of Ideas": A Substitute For State Action As A Limiting Principle Under the Massachusetts Equal Rights Amendment*, 18 SUFFOLK U.L. REV. 347, 369 (1984), the author argues that identical language in

Of the seventeen states with ERAs, five of them expressly proscribe only state action.[58] Of the eleven states besides Maryland that do not explicitly limit the reach of their ERAs to state action,[59] only five have reached the state action question.[60] Of those five, four have ERA language very similar to Maryland's in that they all mandate equality "under the law."[61] The unanimous view of the courts in all of these states is that their ERAs are only designed to prevent state action.[62]

Some state courts, however, have rejected the federal analysis in defining the scope of the state action requirement.[63] The Penn-

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the Massachusetts ERA does not require a showing of state action. Heins argues that analogizing to the "under color of law" language of 42 U.S.C. § 1983 (1976 & Supp. V 1981) is inappropriate. She also argues that because five state ERAs and the fourteenth amendment have "under the law" or "equal protection of the law" as well as an explicit state action requirement, the "under the law" language by itself does not mandate state action. Heins, *supra*, at 370.

58. Colorado, Hawaii, Louisiana, Virginia, and Wyoming. *See* Comment, *supra* note 6, at 1111-12.

59. Alaska, Connecticut, Illinois, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, and Washington. *See id.*; N.H. CONST. pt. 1, art. 2.

60. Connecticut, Massachusetts, Pennsylvania, Texas, and Washington. *See* Comment, *supra* note 6, at 1111-12.

61. MASS. CONST. pt. 1, art. I ("Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."); PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."); TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."); WASH. CONST. art. XXXI, § 1 ("Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.").

The Connecticut Constitution's language is somewhat different: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex." CONN. CONST. art. I, § 20.

62. Schreiner v. McKenzie Tank Lines & Risk Management Servs. Inc., 408 So. 2d 711, 715-16 (Fla. Dist. Ct. App. 1982); United States Jaycees v. Massachusetts Comm. Against Discrimination, 391 Mass. 594, 609 n.9, 463 N.E.2d 1151, 1160 n.9 (1984); Murphy v. Harleysville Mut. Ins. Co., 282 Pa. Super. 244, 257, 422 A.2d 1097, 1104 (1980), *cert. denied*, 454 U.S. 896 (1981); Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922, 925 (Tex. Ct. App. 1979); MacLean v. First Northwest Indus. of Am., 24 Wash. App. 161, 600 P.2d 1027, 1029 (1979), *rev'd*, 96 Wash. 2d 338, 635 P.2d 683 (1981).

63. *See, e.g.*, Ebitz v. Pioneer Nat'l Bank, 372 Mass. 207, 211, 361 N.E.2d 225, 227 (1977) (stating in dicta that the ERA would prohibit a private trust's scholarship fund being limited to boys); *Murphy*, 282 Pa. Super. at 257, 422 A.2d at 1104 (holding that automobile insurance rates which allegedly discriminated against unmarried males under 30 did not violate the Pennsylvania ERA because setting insurance rates does not involve state action); *Lincoln*, 576 S.W.2d at 924 (holding that "the words 'Under the law' in the [Texas ERA] . . . require that the discrimination complained of is state action or private conduct that is encouraged by, enabled by, or closely interrelated in function

sylvania Supreme Court, for example, held,

> The rationale underlying the "state action" doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own inorganic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling.[64]

In cases outside of the gender discrimination context, a number of state courts have expanded the federal courts' conception of state action,[65] particularly in free speech cases. In response to United States Supreme Court decisions which held that the owners of private shopping malls were not state actors for first amendment purposes and therefore were free to restrict speech in their malls,[66] a number of state courts ruled that under their state constitutions, state action is broad enough to include such semi-public places.[67]

The Maryland courts, however, have generally adhered very closely to the federal model of state action.[68] Hence, the Maryland

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with state action"); Junior Football Ass'n of Orange v. Gaudet, 546 S.W.2d 70, 71 (Tex. Ct. App. 1976) (holding that an injunction requiring a football association to allow females to participate must be set aside because evidence of state action was insufficient).

64. Hartford Accident & Indem. Co. v. Insurance Comm'n of the Commonwealth of Pa., 505 Pa. 571, 588, 482 A.2d 542, 549 (1984).

65. *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. & Tel., 24 Cal. 3d 458, 474, 595 P.2d 592, 602, 156 Cal. Rptr. 14, 24 (1979) (holding that the equal protection provision of the California Constitution operates to bar a state-protected public utility from arbitrarily or invidiously discriminating in its employment decisions); Sharrock v. Dell-Buick Cadillac, Inc., 45 N.Y.2d 152, 163-64, 379 N.E.2d 1169, 1176, 408 N.Y.S.2d 39, 46 (1978) (holding that a lien law involved state action in violation of the due process clause because it empowered a garageman to conduct an *ex parte* sale of a bailed automobile).

66. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976).

67. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), *aff'd*, 447 U.S. 74 (1980) (shopping center); Batchelder v. Allied Stores Int'l Inc., 388 Mass. 83, 90 n.9, 445 N.E.2d 590, 594 n.9 (1983) (shopping center); State v. Schmid, 84 N.J. 535, 549, 423 A.2d 615, 622 (1980), *appeal dismissed*, 455 U.S. 100 (1982) (college campus); Commonwealth v. Tate, 495 Pa. 158, 171-73, 432 A.2d 1382, 1388-90 (1981) (private college); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 243-46, 635 P.2d 108, 116-17 (1981) (shopping center). *See also* Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 168-69 (1980).

68. The following is from the Report of the Constitutional Commission considering a proposed amendment adding a due process clause to the Maryland Constitution. The amendment was rejected by the voters:

> [T]he Commission's position [is] that the function of a Declaration of Rights is to state those personal rights which the people want protected from the exercise of the powers of government and that a constitution or Declaration of

courts have construed the due process[69] and just compensation[70] provisions in article 24 of the Maryland Constitution in the same way the federal courts construe similar provisions in the federal constitution.[71] It is not unprecedented, however, for the Maryland Court of Appeals to interpret a provision in the state constitution differently from a similar one in the federal constitution. In *Horace Mann League of the United States v. Board of Public Works*,[72] for example, the court held that funding arrangements for schools with religious affiliations violated the establishment clause of the first amendment to the federal constitution, but did not violate a similar provision of article 36 of the Maryland Constitution.[73]

Within the context of the Maryland ERA, the "state action" question did not arise prior to *Burning Tree* because all the previous ERA cases involved challenges to statutes where state action was clearly present.[74] Nevertheless, the Attorney General of Maryland has expressed the opinion that the ERA is applicable only against governmental action.[75]

B. Level of Scrutiny

Under the Supreme Court's analysis of the equal protection clause of the fourteenth amendment, classifications based on race

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> Rights should not be used as the means for protecting the rights of private persons against the actions of other private persons.

CONSTITUTIONAL CONVENTION COMMISSION, REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 104 (1967).

69. *See, e.g.*, Department of Transp. v. Armacost, 299 Md. 392, 415-16, 474 A.2d 191, 203 (1984); Pitsenberger v. Pitsenberger, 287 Md. 20, 27, 410 A.2d 1052, 1056, *appeal dismissed*, 449 U.S. 807, *reh'g denied*, 449 U.S. 1028 (1980).

70. *See, e.g.*, King v. State Roads Comm'n of State Highway Admin., 298 Md. 80, 83-84, 467 A.2d 1032, 1034 (1983); Bureau of Mines v. George's Creek, 272 Md. 143, 156, 321 A.2d 748, 755 (1974).

71. *But see* Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 640, 458 A.2d 758, 781 (1983) (the fourteenth amendment and article 24 of the Maryland Declaration of Rights are "in *pari materia* and generally apply in like manner and to the same extent; nevertheless the two provisions are independent of each other so that a violation of one is not necessarily a violation of the other."). *See also* 68 Op. Att'y Gen. (Md.) 173, 178-84 (1983) (suggesting that, even in the fourteenth amendment context, Maryland may be more willing to find state action than its federal counterparts).

72. 242 Md. 645, 220 A.2d 51, *cert. denied & appeal dismissed*, 385 U.S. 97 (1966).

73. *Id.* at 684-90 (holding that the grants did not violate article 36 because the grants were to higher educational institutions with a religious affiliation and the state has never attempted to provide universal educational facilities for its citizens at that level).

74. *See, e.g.*, Rand v. Rand, 280 Md. 508, 516, 374 A.2d 900, 905 (1977) (holding that when the state imposes parental obligations for child support, it is not primarily an obligation of the father, but is one shared by both parents). For a further discussion of *Rand*, see *infra* notes 117-119 and accompanying text.

75. 65 Op. Att'y Gen. (Md.) 103 (1980); 63 Op. Att'y Gen. (Md.) 246, 250 (1978).

and national origin[76] are subject to strict scrutiny.[77] That is, such classifications "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose."[78] The Court came close to making sex-based classifications subject to strict scrutiny in *Frontiero v. Richardson*,[79] where a four-member plurality said that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect and must therefore be subjected to strict judicial scrutiny."[80] A majority of the Court, however, has never held that sex-based classifications are subject to strict scrutiny. Instead, the Court has developed an intermediate level of scrutiny: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[81] This is the standard currently applied to sex-based classifications challenged on federal equal protection grounds.[82]

In contrast, most courts in states with ERAs impose strict scru-

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76. Korematsu v. United States, 323 U.S. 214, 217-19 (1944) (holding that excluding Japanese-Americans from certain areas on the West Coast was not unconstitutional because it could pose a military danger in the war with Japan).

77. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that a Virginia statute preventing interracial marriage violated the equal protection and due process clauses of the fourteenth amendment).

78. Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

79. 411 U.S. 677, 690-91 (1973) (holding unconstitutional a federal law permitting male members of the armed forces to claim their spouses as dependents, but not allowing female members to claim their spouses absent proof of dependency).

80. *Id.* at 688. Although the Supreme Court's language in *Frontiero* and its decisions in older cases such as Hernandez v. Texas, 347 U.S. 475 (1954), suggest that alienage is a suspect class, the Court's 1978 decision in Foley v. Connelie, 435 U.S. 291 (1978), has made the *Frontiero* plurality's assertion that alienage is a suspect class somewhat less certain. In *Foley* the Court declined to apply strict scrutiny to a law requiring that New York state troopers be United States citizens. 435 U.S. at 296.

81. Craig v. Boren, 429 U.S. 190, 197 (1976).

82. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (holding that the policy of the Mississippi University for Women, which limits enrollment to women, violated the equal protection clause of the fourteenth amendment); Michael M. v. Superior Court, 450 U.S. 464, 472-76 (1981) (holding that a California statute which prohibited sexual intercourse with women under age 18, but not with men, did not violate the equal protection clause of the fourteenth amendment); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (holding that a Louisiana statute giving a husband the right to unilaterally dispose of jointly owned community property without the spouse's consent violated the equal protection clause of the fourteenth amendment); Orr v. Orr, 440 U.S. 268, 283 (1979) (holding that an Alabama statute imposing alimony obligations on husbands but not wives violated the equal protection clause of the fourteenth amendment). Justice Powell, concurring in *Frontiero*, suggested that the passage of the ERA would mean the application of strict scrutiny to sex-based classifications. 411 U.S. at 692 (Powell, J., concurring).

tiny to sex-based classifications.[83] In Massachusetts, for example, the supreme court stated:

> We believe that the application of the strict scrutiny-compelling State interest test is required in assessing any governmental classification based solely on sex. . . . To use a standard in applying the Commonwealth's equal rights amendment which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it.[84]

Two states, Washington[85] and Pennsylvania,[86] have adopted the so-called "absolute standard" to sex-based classifications, a tougher test than even strict scrutiny.[87] In Pennsylvania, the

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83. *See, e.g.*, People v. Green, 183 Colo. 25, 28, 514 P.2d 769, 770 (1973) (in dicta the court noted that sex classifications must receive the "closest" judicial scrutiny); Page v. Welfare Comm'r, 170 Conn. 258, 270-71, 365 A.2d 1118, 1125 (1976) (holding unconstitutional a Connecticut statute which provided that a working woman, with children and a working husband, had a lower exemption for purposes of adjusting welfare payments than a working man with children and a working wife); People v. Ellis, 57 Ill. 2d 127, 133, 311 N.E.2d 98, 101 (1974) (holding that an Illinois statute which restricted prosecution of boys under 18 and girls under 17 violated the equal protection clause because there was no compelling state interest to justify treating a 17-year-old boy differently than a 17-year-old girl); Commonwealth v. King, 374 Mass. 5, 21, 372 N.E.2d 196, 206 (1977) (in dicta the court noted that sex classifications are subject to the strictest judicial scrutiny); *In re* Unnamed Baby McLean, 725 S.W.2d 696, 698 (Tex. 1987) (holding that a Texas statute with a gender-based distinction relative to fathers' legitimation of illegitimate children violated the Texas ERA).

Two states appear not to have construed their ERAs at all—Montana and New Mexico. *See* Comment, *supra* note 6, at 1088.

California and North Dakota, although lacking ERAs, have recognized sex as a suspect classification under their equal protection clauses. Sail'er Inn Inc. v. Kirby, 5 Cal. 3d 1, 22, 485 P.2d 529, 543, 95 Cal. Rptr. 329, 343 (1971) (holding that a California statute barring women from tending bar in certain situations violated the California Constitution); Tang v. Ping, 209 N.W.2d 624, 627 (N.D. 1973) (holding that a North Dakota statute defining adulthood as 18 for males and 21 for females would deny to males between the ages of 18 and 20 equal protection of the law).

84. Opinion of the Justices to the House of Representatives, 374 Mass. 836, 839-40, 371 N.E.2d 426, 428 (1977).

85. Darrin v. Gould, 85 Wash. 2d 859, 877, 540 P.2d 882, 893 (1975) (holding that a school district's decision to bar high school girls from playing on their high school football team was unconstitutional). For additional discussion concerning *Darrin*, see *infra* notes 89-90 and accompanying text.

86. Commonwealth v. Butler, 458 Pa. 289, 301-03, 328 A.2d 851, 858-59 (1974) (holding that a Pennsylvania statute prescribing that all men receive minimum sentences and that all women not be given minimum sentences was unconstitutional).

87. In a less significant variation, a few states have applied a lower level of scrutiny than that available under the fourteenth amendment analysis. In Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973), the Virginia Supreme Court applied only a rational basis test to a statute, challenged under the state ERA, which permitted mothers (but not fathers) to be excused from jury duty. *Id.* at 638, 194 S.E. 2d at 711. A rational basis

supreme court interpreted that state's ERA to mean that

> the sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman.[88]

In *Darrin v. Gould*[89] the Washington Supreme Court, noting that sex-based classifications already were subject to strict scrutiny under the state's equal protection clause, said that the ERA was "intended to do more than repeat what was already contained in the otherwise governing constitutional provisions . . . by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests."[90] In a later case the court spoke even more forcefully:

> The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional "strict scrutiny." The ERA . . . absolutely prohibits the sacrifice of equality for any state interest, no matter how compelling, though separate equality may be permissible in some very limited circumstances.[91]

While Pennsylvania has adhered rather closely to this standard,[92] the Washington Supreme Court, despite the sweeping language in *Darrin*, has issued subsequent rulings which leave the meaning of the absolute standard unclear in Washington. Since *Darrin*, the Washington court has upheld an ordinance which made it "lewd conduct" to expose female breasts in public,[93] has upheld a statute requiring that the State Democratic Committee consist of a

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test requires only that a classification "bear a rational relation to a legitimate governmental purpose." Regan v. Taxation With Representation of Washington, 461 U.S. 540, 547 (1983). This variation is considerably less stringent than intermediate scrutiny under the equal protection standard. *See also* Broussard v. Broussard, 320 So. 2d 236, 238-39 (La. Ct. App. 1975) (upholding, in a divorce case, the trial court's judgment in awarding custody of the children to the wife because it was not "unreasonable, capricious, or arbitrary"); Cox v. Cox, 532 P.2d 994, 996 (Utah 1975) (upholding, in a divorce case, the trial court's judgment in awarding custody of the children to the wife).

88. Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974).

89. 85 Wash. 2d 859, 540 P.2d 882 (1975).

90. *Id.* at 871, 540 P.2d at 889.

91. Southwest Washington Chapter Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wash. 2d 109, 127, 667 P.2d 1092, 1102 (1983).

92. Comment, *Washington's Equal Rights Amendment: It Says What It Means and It Means What It Says*, 8 U. PUGET SOUND L. REV. 461, 481-83 (1985).

93. Seattle v. Buchanan, 90 Wash. 2d 584, 592, 584 P.2d 918, 922 (1978).

male and female from each county,[94] and has refused to consider a claim that a "Ladies Night" offering lower prices to women than men violated the ERA.[95] At least one commentator believes that Washington can no longer be considered an absolute standard state.[96]

Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, a widely cited article by Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman (Brown),[97] appears to have been the genesis for the absolute standard. Brown argued for an absolute construction of the proposed federal ERA: "[T]he constitutional mandate must be absolute. The issue under the Equal Rights Amendment cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor."[98]

This aversion to applying strict scrutiny is based on a perception that even this standard permits too much discretion and might allow some classifications to survive.[99] Brown does not specifically contrast the circumstances surrounding sex-based classifications with the circumstances surrounding race-based classifications. Thus, it is unclear whether Brown views strict scrutiny as inadequate for race-based classifications as well or whether Brown sees strict scrutiny as more likely to be abused in the area of sex. In any case, the clear impression given by Brown is that the proposed absolute

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94. Marchioro v. Chaney, 90 Wash. 2d 298, 308, 582 P.2d 487, 493 (1978), *aff'd*, 442 U.S. 191 (1979).

95. MacLean v. First Northwest Indus., 96 Wash. 2d 338, 348, 635 P.2d 683, 688 (1981).

96. *See* Comment, *supra* note 92, at 464. That commentator considers Pennsylvania to be the only state adhering to an absolute standard of review. That author views the Washington court's decision in *Marchioro*, 90 Wash. 2d at 308, 582 P.2d at 493, upholding a statute requiring that the two delegates to the State Democratic Committee from each county be of the opposite sex, as abandoning the absolute standard. Comment, *supra* note 92, at 464.

97. Brown, Emerson, Falk & Freedman, *Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

98. *Id.* at 892. Further explicating the phrase, "sex is not a permissible factor," the authors argue "[t]his means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other." *Id.* at 889.

99. [T]he judgment as to whether differential treatment is justified or not would rest in the hands of the very legislatures and courts which maintain the existing system of discrimination. The process by which they make that judgment involves the same discretionary weighing of preferences as has resulted in the present inequality. This is true whether the standard of judging is "reasonable classification," "suspect classification," or "fundamental interest."

Id. at 892.

standard is a tougher obstacle to overcome than strict scrutiny because some classifications that could survive strict scrutiny could not pass the absolute standard.

After presenting the basic principle, Brown immediately announces a "subsidiary principle" which states that the ERA "does not preclude legislation . . . which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex."[100] In a second caveat, Brown argues that the constitutional right of privacy would permit a narrow range of sex-segregated practices involving "disrobing, sleeping, or performing personal bodily functions in the presence of the other sex."[101] Finally, Brown says that while sex-based classifications designed to benefit women in general would not be permitted under the absolute standard, affirmative action measures to remedy past discrimination in particular cases would be permissible.[102]

Despite these qualifications, Brown makes it clear that the application of the absolute standard would provide more protection to equal rights for women than strict scrutiny.[103] The authors specifically reject any reading of the ERA which would permit separate but equal arrangements except those covered by the privacy doctrine: "As to facilities provided or subsidized by the government . . . [t]he separate-but-equal doctrine is wholly inconsistent with the principles and objectives of the Equal Rights Amendment."[104] Brown acknowledges that the "subsidiary principle" could be used as a subterfuge for laws discriminating against one sex, but resolves this by urging courts to apply strict scrutiny to laws dealing with physical characteristics unique to one sex.[105]

Yet, Washington has created considerable confusion in its application of the subsidiary principle. In *Seattle v. Buchanan*,[106] for example, the Washington Supreme Court applied this exception and upheld an ordinance which made it "lewd conduct" to expose female breasts in public.[107] The court reasoned that the ordinance "applies alike to men and women, requiring both to cover those parts of their body which are intimately associated with the procrea-

100. *Id.* at 893.
101. Brown, *supra* note 97, at 901.
102. *Id.* at 904.
103. *Id.* at 889-93.
104. *Id.* at 903.
105. Brown, *supra* note 97, at 894.
106. 90 Wash. 2d 584, 584 P.2d 918 (1978).
107. *Id.* at 591, 584 P.2d at 921.

tion function."[108] Also, because the unique physical characteristics of female breasts bear "a direct relationship to the legislative purpose—the preservation of public decency and order," the ordinance was not discriminatory.[109] Significantly, in upholding the ordinance, the Washington Court required only a reasonable relationship to a legislative purpose rather than a compelling governmental interest as endorsed by Brown. Further, in *Marchioro v. Chaney*,[110] the Washington Supreme Court relied on the affirmative action language in Brown to uphold a statute requiring that the two members of the State Democratic Committee be of the opposite sex.[111] The *Marchioro* court said the statute was not discriminatory in that it did not place burdens on one sex without placing similar burdens on the other.[112] Finally, in *MacLean v. First Northwest Industries*,[113] the Washington Supreme Court ruled that there was "no cognizable discrimination" when a state-run sports complex held a "Ladies Night."[114]

The Maryland courts failed to adopt an explicit standard to be applied to sex-based classifications during the ERA's first five years between 1972 and 1977. During this period, however, Maryland courts upheld a conviction under a rape statute that applied only to men[115] and approved a common-law preference for mothers over fathers in custody battles.[116]

In 1977, however, Maryland appeared to join the absolute scrutiny states when it held in *Rand v. Rand*[117] that a common-law rule making the father primarily responsible for his minor children was irreconcilable with the ERA.[118] In that case Judge Murphy quoted both the Washington and Pennsylvania courts with approval, and in discussing the Maryland ERA he said that "[t]his language mandat-

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108. *Id.*

109. *Id.*

110. 90 Wash. 2d 298, 582 P.2d 487 (1978), *aff'd*, 442 U.S. 191 (1979).

111. *Id.* at 308, 582 P.2d at 493. In Southwest Washington Chapter Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wash. 2d 109, 123-29, 667 P.2d 1092, 1100-03 (1983), the Washington Supreme Court also upheld a county's affirmative action hiring plan.

112. 90 Wash. 2d at 306, 582 P.2d at 492.

113. 96 Wash. 2d 338, 635 P.2d 683 (1981).

114. *Id.* at 348, 635 P.2d at 688.

115. Brooks v. Maryland, 24 Md. App. 334, 337-39, 330 A.2d 670, 672-73 (1975).

116. Cooke v. Cooke, 21 Md. App. 376, 379, 319 A.2d 841, 843 (1974). The legislature responded to the *Cooke* decision with a statute which barred giving either parent a preference because of their sex. MD. ANN. CODE art. 72A, § 1 (1974) (repealed 1984).

117. 280 Md. 508, 374 A.2d 900 (1977).

118. *Id.* at 516, 374 A.2d at 905.

ing equality of rights can only mean that sex is not a factor."[119] Some courts[120] and commentators[121] have concluded from the language of the *Rand* opinion that Maryland has joined those states with an absolute standard.

II. STATEMENT OF THE CASE

It was against this background that the Maryland Court of Appeals considered *Burning Tree Club, Inc. v. Bainum*.[122] Burning Tree is a private golf club which was established in 1922 on approximately 225 acres in Bethesda, Maryland. Burning Tree has never allowed women to become members or enjoy guest privileges.[123] In 1965 the Maryland General Assembly enacted section 19(e) of article 81 which authorized the Maryland State Department of Assessments and Taxation to offer private clubs deferment of their property taxes in exchange for agreeing not to sell or develop their open spaces.[124] The 1965 Act did not mention discrimination.

In 1965 Burning Tree and the State entered into such an agreement for a period of ten years. The agreement was extended for another ten years in 1975, and in 1981 Burning Tree entered into a fifty-year agreement with the State.[125] In 1974 the General Assembly amended section 19(e) to require that clubs receiving tax deferrals not discriminate in "granting membership or guest privileges based upon the race, color, creed, sex, or national origin of any person or persons."[126] The amendment, however, qualified the prohibition on sex-based discrimination as follows:

> The provisions of this section with respect to discrimination in sex shall not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex, nor to the clubs which exclude certain sexes only

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119. *Id.* at 512, 374 A.2d at 903.

120. *See, e.g.*, Doe v. Maher, 40 Conn. Supp. 394, 515 A.2d 134, 162 (1986) (holding that state regulations restricting Medicaid payments for therapeutic abortions were unconstitutional); Peppin v. Woodside Delicatessen, 67 Md. App. 39, 48, 506 A.2d 263, 267-68 (1986) (holding that a 50% discount for all patrons wearing a skirt or gown was unconstitutional).

121. *See, e.g.*, Avner, *supra* note 6, at 148-49; Comment, *State Equal Rights Amendments: Models for the Future*, 1984 ARIZ. ST. L.J. 693, 699 n.37.

122. 305 Md. 53, 501 A.2d 817 (1985).

123. *Id.* at 58, 501 A.2d at 819.

124. MD. ANN. CODE art. 81, § 19(e) (1980).

125. 305 Md. at 59, 501 A.2d at 820.

126. Act of May 31, 1974, ch. 870, 1974 Md. Laws 2913 (codified at MD. ANN. CODE art. 81, § 19(e)(4)(i) (1980)).

on certain days and at certain times.[127]

This is the "primary purpose" provision.[128] While approximately twenty country clubs in Maryland receive open spaces tax deferrals,[129] only Burning Tree benefited from the "primary purpose" exception to the anti-discrimination language of section 19(e)(4).[130]

On August 12, 1983, Maryland State Senator Stewart Bainum, Jr., as a taxpayer, and Barbara Renschler, as a taxpayer and as a woman seeking membership in Burning Tree, filed suit against the State, the Department of Assessments and Taxation, and Burning Tree in the Circuit Court for Montgomery County.[131] The plaintiffs asked for a declaration that the "primary purpose" provision violated Maryland's ERA, an order barring any further preferential tax treatment for Burning Tree, and an order requiring Burning Tree to accept membership applications from women. The circuit court declared that although the "primary purpose" provision was facially neutral, it violated the ERA because it discriminated against women.[132] The court enjoined further preferential tax treatment for Burning Tree,[133] but declined to order Burning Tree to accept women as members.[134]

On appeal, a majority of the court of appeals agreed that the "primary purpose" provision violated the ERA.[135] A different majority, however, reasoned that the provision was not severable from the broader anti-sex discrimination language of the entire statute.[136] The decision was complicated. In writing for three judges, Judge Eldridge stated that the primary purpose language violated the ERA[137] and was severable from the broader anti-sex discrimination language of the statute.[138] Judge Murphy commanded three votes for the view that the provision did not violate the ERA[139] and that if it did, the offending language was not severable from the other anti-

127. Act of May 31, 1974, ch. 870, 1974 Md. Laws 2913.

128. 305 Md. at 58, 501 A.2d at 819.

129. Wash. Post, Dec. 24, 1985, at A-8, col. 3.

130. 305 Md. at 59, 501 A.2d at 820.

131. *Id.* at 59, 501 A.2d at 820. State Senator Bainum and Ms. Renschler are brother and sister. Wash. Post, Dec. 24, 1985, at A-1, col. 1.

132. 305 Md. at 61, 501 A.2d at 821.

133. *Id.* at 60, 501 A.2d at 820.

134. *Id.* at 61-62, 501 A.2d at 821.

135. *Id.* at 84, 501 A.2d at 832-33.

136. 305 Md. at 84, 501 A.2d at 832-33. Judge Eldridge said, in effect, that the court's entire mandate in this case reflected the conclusions of one member only. *Id.* at 91 n.5.

137. *Id.* at 88, 501 A.2d at 835.

138. *Id.* at 102-05, 501 A.2d at 842-44.

139. *Id.* at 75-79, 501 A.2d at 828-30.

sex discrimination language of the statute.[140] Judge Rodowsky wrote an opinion agreeing that the provision violated the ERA[141] but also agreeing that the language was not severable.[142] The effect of the court's holding was to strike down *in toto* the General Assembly's amendment of section 19(e) prohibiting sex discrimination by clubs receiving preferential tax treatment, thus allowing Burning Tree to continue its discriminatory policies while retaining the tax break.

Judge Murphy believed the ERA did not apply to this type of statute. He said, "The cases construing equal rights amendments share a common thread; they generally invalidate governmental action which imposes a burden on one sex but not the other."[143] Judge Murphy argued that because the statute on its face made the tax benefit available to any eligible country club, whether all-male or all-female, "it does not apportion or distribute benefits or burdens unequally among the sexes."[144] Judge Murphy said that "[u]nder its terms the primary purpose provision is sex-neutral because it operates without regard to gender."[145]

Acknowledging that a gender-neutral statute could be unconstitutional if it had a discriminatory purpose and effect, Judge Murphy next considered whether the State, in passing section 19(e)(4) had aided "Burning Tree in a way which makes its discriminatory policy attributable to the State itself."[146]

After discussing the state action analysis propounded by the Supreme Court in several recent equal protection cases, Judge Murphy concluded that "the doctrine plainly has no application in the circumstances of this case."[147] Judge Murphy reasoned that since the State neither initiated nor encouraged Burning Tree's single-sex membership policy and since the Attorney General's role under the statute was that of a mere "factfinder," the requisite state action was not present.[148] Judge Murphy distinguished this case from *Norwood v. Harrison*.[149] In *Norwood*, the Supreme Court held that a Mississippi law providing free textbooks to students in private schools

140. 305 Md. at 84, 501 A.2d 832-33.
141. *Id.* at 85, 501 A.2d at 833.
142. *Id.* at 88, 501 A.2d at 835.
143. *Id.* at 70, 501 A.2d at 825.
144. 305 Md. at 71, 501 A.2d at 826.
145. *Id.* at 71, 501 A.2d at 826.
146. *Id.* at 72, 501 A.2d at 826.
147. *Id.* at 75, 501 A.2d at 828.
148. 305 Md. at 76, 501 A.2d at 829.
149. 413 U.S. 455 (1973).

practicing racial discrimination involved state action in violation of the fourteenth amendment.[150] Judge Murphy noted that *Norwood* was not controlling authority for a state constitutional claim, and that even if a fourteenth amendment claim was at issue in this case, *Norwood* would not be applicable "since the Supreme Court applies a more lenient standard of review to sex discrimination cases than to race discrimination cases."[151] Interestingly, Judge Murphy added:

> The Supreme Court's analysis in *Norwood* is inapplicable to cases that arise under the Maryland E.R.A. As our cases clearly demonstrate, state action does not violate the E.R.A. unless it has the effect of abridging or denying "equality of rights under the law" on the basis of sex. . . . In contrast, *Norwood* indicated that the Fourteenth Amendment "does not permit the State to aid discrimination even when there is no precise causal relationship between the state financial aid to a [racially discriminatory] private school and the continued well-being of that school" . . . . Thus although a causal connection between the state action and the discrimination is required under the Maryland E.R.A., it was not required under *Norwood's* analysis of the Fourteenth Amendment. We therefore find *Norwood* inapposite to the present case.[152]

Judge Rodowsky agreed with Judge Murphy that "the roles of the Attorney General and of the State Department of Assessments and Taxation under art. 81, sec. 19(e)" did not amount to state action.[153] Judge Rodowsky added, however, that the General Assembly's inclusion of statutory language banning sex discrimination was state action because "legislation is state action."[154] He went on to conclude that the primary purpose provision cannot stand because the "ERA . . . prevents the General Assembly from conferring lesser benefits on persons who are objects of sex based discrimination" than persons who are objects of other types of discrimination such as race.[155]

Seeing the ERA as clearly applicable in this case, Judge Eldridge rejected Judge Murphy's view that "the ERA is narrowly lim-

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150. *Id.* at 463-65.

151. 305 Md. at 77, 501 A.2d at 829.

152. *Id.* at 78, 501 A.2d at 829.

153. *Id.* at 85, 501 A.2d at 833.

154. *Id.* at 86, 501 A.2d at 833-34. For the language included by the General Assembly, see Act of May 31, 1974, ch. 870, 1974 Md. Laws 2913 (codified at MD. ANN. CODE art. 81, § 19(e)(4)(i) (1980)).

155. 305 Md. at 88, 501 A.2d at 834.

ited" to cases involving "government action directly imposing a burden or conferring a benefit entirely upon either males or females."[156] Judge Eldridge agreed with Judge Rodowsky that section 19(e)(4) "on its face draws classifications based on gender."[157] Judge Eldridge equated the "under the law" provision in the ERA with the state action doctrine applicable to the fourteenth amendment.[158] He explained that the

> principal classification implicating the ERA arises from the language authorizing clubs, totally segregated on the basis of sex, to maintain their discriminatory practices and, at the same time, to continue receiving a significant state benefit. On the other hand, sexually integrated country clubs are generally precluded from discriminating on the basis of sex.[159]

Judge Eldridge concluded that in section 19(e)(4) "the General Assembly has expressly made classifications using sex as a factor."[160] Unlike Judges Murphy and Rodowsky, Judge Eldridge found that the "administrative machinery" set up by the statute so involved the State in Burning Tree's discriminatory practices as to amount to state action.[161]

Having found state action present, and after noting cases from a number of states interpreting their ERAs, Judge Eldridge determined that Maryland's "ERA makes sex classifications subject to at least the same scrutiny as racial classifications."[162] He noted, however, that

> because of the inherent differences between the sexes, some sex-based classifications may be justified after such scrutiny whereas comparable race-based classifications could not be sustained . . . . Thus, separate restrooms or locker room facilities for blacks and whites cannot be tolerated, but such separate facilities for men and women can be justified by the state.[163]

The 1985 *Burning Tree* decision has not completely clarified how the ERA will be applied to these kinds of cases in Maryland. This is

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156. *Id.* at 95, 501 A.2d at 838.
157. *Id.* at 99, 501 A.2d at 840.
158. *Id.* at 90 n.3, 501 A.2d at 836 n.3.
159. 305 Md. at 90 n.3, 501 A.2d at 836 n.3.
160. *Id.* at 98-99, 501 A.2d at 840.
161. *Id.* at 92-93, 501 A.2d at 837.
162. *Id.* at 98, 501 A.2d at 840.
163. 305 Md. at 98, 501 A.2d at 840.

evident from the legislative and judicial events since *Burning Tree*. On April 4, 1986, the Maryland General Assembly amended section 8-214 of the Tax-Property Article to eliminate Burning Tree's preferential tax assessment.[164] The amendment reinstated the prohibition of sex discrimination without any "primary purpose" provision. In rewriting the law, however, the legislature continued to permit periodic discrimination; that is, country clubs still were allowed to exclude or admit men or women on certain days or at certain times and have practices such as separate tee-off times for men and women.[165]

On July 1, 1986, Burning Tree filed suit in Anne Arundel County Circuit Court claiming that the new law breached the contract the State had signed with Burning Tree.[166] Burning Tree asked that the law not be enforced until the contract expires. In a display of "chutzpah," Burning Tree also claimed that the new law violated Maryland's ERA by permitting clubs to engage in "periodic discrimination."[167] On July 21, 1987, the Anne Arundel County Circuit Court struck down the new statute as violative of the ERA.[168] The circuit court opinion noted that although Judge Eldridge's opinion in *Burning Tree Club, Inc. v. Bainum*[169] declined to resolve the periodic discrimination issue,[170] Judge Rodowsky's opinion specifically said that periodic discrimination was unconstitutional.[171] The circuit court recognized that although Judge Eldridge applied a strict scrutiny standard rather than an absolute standard in *Burning Tree Club, Inc. v. Bainum*,[172] it did not "believe Judge Eldridge's opin-

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164. MD. TAX-PROP. CODE ANN. § 8-214 (Supp. 1987), *as amended by* Act of May 13, 1986, 1986 Md. Laws 1317.

165. *Id.*

166. Wash. Post, July 2, 1986, at B-7, col. 5.

167. *Id.* An affidavit filed in the case by Stephen Clarkson, a member of Burning Tree's Board of Governors, listed 11 Maryland country clubs with open spaces contracts that practiced periodic discrimination. Affidavit of Stephen Clarkson, Burning Tree v. Maryland, No. 310-8902, slip op. (Anne Arundel County Cir. Ct. July 21, 1987).

168. Burning Tree v. Maryland, No. 310-8902, slip op. (Anne Arundel County Cir. Ct. July 21, 1987).

169. 305 Md. 53, 501 A.2d 817 (1985).

170. No. 310-8902, slip op. at 31 (citing *Burning Tree*, 305 Md. at 90 n.1, 501 A.2d at 520 n.1).

171. *Id.* at 39 (citing 305 Md. at 87, 501 A.2d at 834).

172. *Id.* at 37. *See also* Peppin v. Woodside Delicatessen, 67 Md. App. 39, 506 A.2d 263 (1986). *Peppin* is the only Maryland appellate case involving the ERA since the 1985 *Burning Tree* decision. The *Peppin* Court of Special Appeals, citing *Burning Tree*, 305 Md. 53, 501 A.2d 817, said that the ERA "prescribes an 'absolute standard' and not a balancing test. Therefore, once discrimination is proved, a court cannot consider arguments attempting to 'balance' the discriminatory practice against other concerns." 67 Md. App. at 46-47, 506 A.2d at 267.

ion overturned *Rand*."[173] Therefore, the circuit court did not apply a strict scrutiny analysis in its determination of the constitutionality of the amendment to section 8-214 of the Tax-Property Article.[174]

The court applied an absolute standard of review and said "the only acceptable reason for treating the sexes differently, under the ERA, is for physical reasons peculiar to one sex."[175] The court struck down the periodic discrimination clause for violating the ERA by applying the absolute standard, but noted that the law would have failed even under strict scrutiny because the State had made no effort to justify the classification.[176]

III. ANALYSIS

This note is in substantial agreement with the Maryland Court of Appeals' decision in *Burning Tree Club, Inc. v. Bainum*[177]—that there was state action and that the "primary purpose" language violated the ERA in that case. The decision, however, can be criticized for failing to clarify what standard is to be applied to sex-based classifications under the Maryland ERA. Although the court effectively applied strict scrutiny for sex-based classification, the court was far from explicit on this point. *Burning Tree* also can be criticized for failing to craft a state action requirement for the Maryland ERA which is independent of the state action standard developed in the federal courts for equal protection analysis.

A. State Action

Although Judges Murphy and Eldridge reached different conclusions about the presence of state action in *Burning Tree*, they both assumed without much discussion that the Maryland ERA is applicable only against state action. Judge Eldridge stated:

> The parties, the other opinions in this case, and decisions under other state constitutional E.R.A. provisions, equate the "under the law" provision in the E.R.A. with the "state action" doctrine under the Fourteenth Amendment. I

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173. No. 310-8902, slip op. at 37. For a discussion of Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977), see *supra* notes 117-119 and accompanying text.

174. No. 310-8902, slip op. at 37.

175. *Id.* at 35 (citing *Burning Tree*, 305 Md. at 64 n.3, 501 A.2d at 822 n.3).

176. *Id.* at 37. The State argued that Burning Tree lacked standing to challenge the law. Significantly, the court relied on *Burning Tree*, 305 Md. 53, 501 A.2d 817, to find that the language of the periodic discrimination provision was not severable from the broader anti-sex discrimination language of the statute. No. 310-8902, slip op. at 37.

177. 305 Md. 53, 501 A.2d 817 (1985).

agree that the two concepts are essentially the same.[178]

A debate has raged between commentators who urge the courts to dispense with the "state action" doctrine entirely and commentators who urge the courts to retain it. The opponents of the state action doctrine argue that the doctrine is based on an "anachronistic premise" about the extent to which the common law protects individuals from "infringements of their rights by private actors."[179] Proponents of state action make a number of arguments: that a state action requirement is inherent in any constitutional provision; that state action requirements protect a zone of personal autonomy and help preserve state autonomy; and that "constitutionalizing private law" would hamper legislative and common-law responses to social issues and would produce disrespect for the constitution.[180] While the court in *Burning Tree* did not discuss the merits of these various claims, its decision to impose a state action requirement was a wise one.

Those who argue for the elimination of the state action requirement are correct in observing that the standards employed in the federal courts appear confusing and inconsistent, shifting as they have from broadly applying the state action doctrine[181] to narrowly applying it.[182] Moreover, some of the arguments for requiring state action are unpersuasive. The view that a state action requirement is inherent in any constitution,[183] for example, is unconvincing since some federal[184] and state[185] constitutional provisions are applicable to private as well as governmental interests. Similarly, the desire to preserve a sphere of state autonomy may be a valid reason for preserving state action in the federal constitutional context, but it is irrelevant in the context of a state's construction of its own constitution.

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178. *Id.* at 90 n.3, 501 A.2d at 836 n.3.

179. *See, e.g.*, Chemerinsky, *supra* note 21, at 506. *See also supra* notes 44-47 and accompanying text.

180. *See supra* notes 48-52 and accompanying text.

181. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelly v. Kraemer, 334 U.S. 1 (1948).

182. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

183. Dolliver, *supra* note 48, at 447 (suggesting that "state action" is a "fundamental premise of a bill of rights").

184. The thirteenth amendment does not require state action: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend XIII, § 1.

185. *See supra* notes 65-67 and accompanying text.

There are, however, two important reasons for requiring state action under the Maryland ERA. First, the language of the amendment tends to indicate an intention to require state action. Second, the state action requirement may be necessary to preserve the individual's freedom of association.

While the "under the law" language of Maryland's ERA does not clearly limit the ERA to state action, that is the most plausible reading of the words. As noted above, the Maryland courts have generally followed the federal approach to the state action requirement[186] and the Maryland Attorney General is of the view that the language of the ERA proscribes only state action.[187] There is no legislative history of the Maryland ERA to indicate the intent of the legislature that passed it.[188] Moreover, contemporaneous understanding of the meaning of the ERA offers little assistance.[189] In April 1974 the Governor's Commission to Study Implementation of the Equal Rights Amendment (Commission) "compiled a list of all possible areas of the law, both statutory and non-statutory which might be affected by the ERA."[190] In doing so, the Commission looked at statutes, case law, state-regulated activity, and "[a]ny other laws or state action which could arguably be the subject of a court challenge under the ERA."[191] This is, admittedly, scant evidence from which to infer a state action requirement.

The more persuasive reason for applying the ERA solely to state action is to preserve a sphere of personal autonomy. While it is not clear that "constitutionalizing private wrongs" will breed disrespect for the constitution, it does seem reasonable that in a pluralistic society which values individual freedom, private individuals should be free to associate with whomever they please. Thus, if individuals want to organize themselves into groups open only to other people like themselves, society should tolerate such an organi-

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186. *See supra* notes 68-71 and accompanying text.

187. *See supra* note 75 and accompanying text.

188. This lack of any indication of the intentions of those involved in passing the ERA is not confined to Maryland. Apparently neither Pennsylvania nor Massachusetts offers much in the way of a legislative history of their ERAs. Because all three states' ERAs were debated and passed at the same time the federal ERA was under consideration, many assumed that the state ERAs were simply miniature versions of the federal proposal. But the language of several ERAs, including Maryland's, differ significantly from the federal ERA in the absence of any explicit state action requirement. *See* Heins, *supra* note 57, at 370.

189. *Id.* at 370.

190. Report of the Governor's Commission to Study Implementation of the Equal Rights Amendment 3 (July 1, 1978).

191. *Id.*

zation. While there are areas of private life where an individual's freedom to associate should be curtailed for the public good (*i.e.*, employment, housing, public accommodations), these areas should be delineated legislatively rather than through the broad brush of a constitutional amendment.

Indeed, the freedom to associate is not merely benevolent public policy; it is a federal constitutional right.[192] Dispensing with a state action requirement or even defining state action too broadly could conflict with this right. The Supreme Court discussed the protection afforded freedom of association in *Roberts v. United States Jaycees*.[193] *Roberts* involved the Jaycees' challenge to a Minnesota Human Rights Commission order requiring that they admit women.[194] The Jaycees' policy had been to restrict its basic membership to men under the age of thirty-five.[195] In *Roberts*, the Court distinguished two types of freedom of association: (1) freedom of intimate association and (2) freedom of expressive association. The first type involves personal affiliations, with the greatest protection given to familial relationships. The second protects associations formed for the expression of political or religious ideas.[196]

In determining the amount of protection afforded to a particular intimate association, the *Roberts* Court indicated that "size, purpose, policies, selectivity, [and] congeniality" are the relevant factors.[197] In *Roberts*, the Court concluded that the Jaycees had a very large membership, were indiscriminate in their admissions policies with the exception of their sex and age restrictions, and allowed nonmembers to participate in their activities.[198] Therefore, the Court concluded the "Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women."[199]

Since it is relatively small and quite exclusive, a club such as Burning Tree might succeed where the Jaycees failed. Thus, legal

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192. The freedom of expressive association is a right protected by the first amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble; and to petition the Government for a redress of grievances." U.S. CONST. amend I.

193. 468 U.S. 609 (1984).

194. *Id.* at 616.

195. *Id.* at 613.

196. *Id.* at 617-18. Presumably, Burning Tree would fall into the first category.

197. 468 U.S. at 620.

198. *Id.* at 621.

199. *Id.* The Court also held that the Jaycees' freedom of expressive association had not been infringed. *Id.* at 628-29.

attacks on truly private but discriminatory clubs might fail on freedom of association grounds.

In order to protect an individual's freedom of association, the Maryland ERA should be applicable only against state action. This does not mean, however, that Maryland should embrace the narrow view of state action currently espoused by the Supreme Court in equal protection cases.[200] Yet, in *Burning Tree*, after having agreed that Maryland's ERA applies only to state action, Judges Murphy and Eldridge both turned to federal equal protection analysis to define the scope of state action.[201]

Judge Murphy's state action analysis rested entirely on the Supreme Court's current approach to state action under the equal protection clause of the fourteenth amendment.[202] These recent Supreme Court cases have found state action only where there is evidence of state intention to advance or approve a discriminatory policy.[203] Using this approach, Judge Murphy concluded that there was no state action present in this case.[204] Even under current federal equal protection analysis, however, it is arguable that state action was present in this case. In *Moose Lodge v. Irvis*,[205] for instance, the Supreme Court held that the Pennsylvania Liquor Control Board's requirement that a club abide by its discriminatory bylaws or lose its liquor license amounted to unconstitutional state action.[206] While Maryland did not require Burning Tree to continue discriminating against women or lose its tax break, it did say that if a club abandoned its policy of serving only men, it would become subject to an additional legal restriction, namely the anti-sex discrimination language of the statute.[207] Thus, as in *Moose Lodge*, the Maryland statute served as a disincentive for clubs to stop discriminating. A club that chose to stop discriminating would assume additional legal restrictions, whereas a club that continued to discriminate on the basis of sex would be subject to fewer legal restrictions.

Judge Eldridge's opinion distinguished the more recent Supreme Court state action cases and looked to an older Fourth Cir-

200. *See supra* notes 28-43 and accompanying text.
201. *See supra* notes 147-152 & 158-161 and accompanying text.
202. *See supra* notes 147-152 and accompanying text.
203. *See supra* notes 28-43 and accompanying text.
204. 305 Md. at 75-76, 501 A.2d at 828-29.
205. 407 U.S. 163 (1972).
206. *Id.* at 178-79.
207. *See supra* note 159 and accompanying text.

cuit case, *Simkins v. Moses Cone Memorial Hospital*.[208] *Simkins* held unconstitutional a federal statute under which federal funds were granted to private hospitals for building and operational expenses.[209] The federal statute prohibited recipients from discriminating on the basis of race, but as in *Burning Tree*, the statute created an exception.[210] In *Simkins*, hospitals that discriminated could receive the funds if they provided separate, but equal, facilities for "separate population groups."[211] The *Simkins* court held that the "degree of state participation and involvement" in the discriminatory aspects of the program were sufficient to find state action present.[212]

The *Simkins* case was decided in 1963 when *Burton v. Wilmington Parking Authority*[213] was the reigning Supreme Court state action case. As discussed above, the definition of state action in the federal courts has neither been clear nor consistent. Borrowing such an ambiguous standard to apply to a provision of the Maryland Constitution serves no useful purpose since it confuses application of the ERA for trial judges, attorneys, and the general public in Maryland. In the face of the chaotic federal concept of state action, Maryland courts should embrace the spirit of federalism and "serve as a laboratory,"[214] creating and experimenting with its own state action standard.

As noted above, one of the rationales for the federal court's view of state action is that in the interest of federalism a sphere of power should be left in the hands of state courts and legislatures.[215] Hence, for the Maryland courts to borrow a state action standard which has been constructed narrowly, partly out of deference to the state courts, is to swallow one's own tail. Therefore, the Maryland courts should develop an independent state action doctrine as other state courts have done in the area of freedom of speech because it would significantly advance the salutary goals of federalism. Moreover, since the federal constitution does not contain an ERA provi-

208. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).
209. *Id.* at 969.
210. *Id.* at 964.
211. *Id.*
212. 323 F.2d at 967.
213. 365 U.S. 715 (1961).
214. Justice Brandeis once noted that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).
215. *See supra* note 43.

sion, Maryland should not apply its ERA through a confused state action standard borrowed from federal equal protection analysis. While the Maryland court has perhaps inextricably entwined its standard for state action under article 24 with the state action standard for the fourteenth amendment,[216] it has not yet done so irrevocably with the ERA. Since equal protection and ERA provisions were enacted at different times to meet different needs, it would be appropriate to have different state action standards for different constitutional provisions.

In delineating the scope of the state action requirement under the ERA, the court should balance two compelling societal interests: the interest in ensuring equal rights for men and women and the interest that citizens in a democratic society enjoy a sphere of personal freedom concerning with whom they associate. While any state action formula is necessarily vague since the determination hinges on the specific facts of each case, it is possible to identify the various activities that should be considered state action for purposes of the ERA. Once the State crosses the line from tolerating private discrimination to promoting it, state action should come into play. Professor Charles Black has articulated a similar principle in the context of racial discrimination:

> This formula would concede . . . that state "neutrality" is barely possible and that neutrality where attained isolates the racial discrimination from state power. But it would qualify this neutrality obligation as one . . . calling for the most scrupulous abstention by the state from any special contact or connection with the discriminatory practice other than the merest failure to make it unlawful . . . . I cannot think why the litmus paper that tests for the corrosive acid of state-supported racism should be any less sensitive than this.[217]

A definition of state action so broad that it would make the existence of organizations such as Burning Tree impossible should be rejected. Thus a state action definition flowing from *Shelley v. Kraemer*,[218] which would make any access to judicial process by such organizations state action, should be rejected. On the other hand, where the government provides financial or other assistance to an organization, or where the state awards coveted licenses or benefits, the recipients should be deemed state actors.

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216. *See supra* notes 68-71 and accompanying text.
217. Black, *supra* note 44, at 99-100.
218. 334 U.S. 1 (1948).

B. Level of Scrutiny

In *Burning Tree*, Judge Murphy, whose opinion in *Rand v. Rand*[219] seemed to announce Maryland's entry into the absolute scrutiny camp, took the view that Maryland's ERA is only implicated where different burdens or benefits are imposed based on sex.[220] This view of the ERA would appear to suggest that separate-but-equal facilities for men and women would be acceptable. Judge Murphy said that

> [w]e need not here give detailed consideration to whether state action in providing "separate but equal" facilities for men and women violates the ERA. Conceivably, a law requiring separation of the sexes might be subject to challenge on the ground that unconstitutional sex discrimination resulted therefrom because of inherent inequality of treatment for one sex or the other in the separation process itself.[221]

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219. 285 Md. 508, 374 A.2d 900 (1977).

220. 305 Md. 53, 70, 501 A.2d 817, 825 (1985).

221. *Id.* at 79, 501 A.2d at 830. Judge Murphy said that in Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975), the Washington Supreme Court, in its decision adopting the absolute standard, suggested that separate but equal athletic teams in public schools for males and females would not violate the state's ERA. 305 Md. at 67, 501 A.2d at 823. This is questionable. The court in *Darrin* cited with approval a decision by a Pennsylvania court (Pennsylvania being the only other state to apply an absolute standard) which held that qualified girls could play on a boys' football team regardless of whether there was a girls' team. Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 53, 334 A.2d 839, 843 (1975). The Washington Supreme Court quoted *Pennsylvania Interscholastic Athletic Ass'n*:

> Even where separate teams are offered for boys and girls in the same sport, the most talented girls still may be denied the right to play at that level of competition which their ability might otherwise permit them. For a girl in that position who has been relegated to the 'girls' team' solely because of her sex, 'equality under the law' has been denied.

85 Wash. 2d at 873, 540 P.2d at 890 (quoting *Pennsylvania Interscholastic Athletic Ass'n*, 18 Pa. Commw. at 52, 334 A.2d at 842).

The *Darrin* court concluded its opinion by agreeing with the Pennsylvania court's rationale

> that under our ERA discrimination on account of sex is forbidden. The . . . rule forbidding qualified girls from playing on the high school football team in interscholastic competition cannot be used to deny the Darrin girls, and girls like them, the right to participate as members of that team. This is all the more so when the school provides no corresponding girls' football team on which girls may participate as players.

85 Wash. 2d at 877-78, 540 P.2d at 893.

This last sentence is the only indication that separate football teams for girls would be acceptable to the *Darrin* court. While it is a tantalizing sentence, looked at in context it appears only to offer another reason for the holding, not to signal a possible exception.

It is not merely conceivable, but indubitable, that the ERA reflects the legislative judgment that such separation is inherently unequal and thus forbidden. Therefore, Judge Murphy appears to advocate an ERA standard that provides less protection than strict scrutiny. Judge Murphy's view on this point illustrates a major flaw in the absolute standard approach. The "absolute standard," given all its exceptions, is a misnomer. For no other reason than accuracy, it should not be called the "absolute standard."

By permitting as many exceptions as it does, the absolute standard ironically has the potential for becoming something much weaker than the strict scrutiny standard. Brown makes it plain that the "subsidiary principle" is a narrow exception to the absolute standard designed to permit such things as laws related to childbearing and forcible rape and regulating wet nurses and sperm donors.[222] Yet, this "subsidiary principle" appears to contain the seeds of destruction for the larger principle by opening the gates to all sorts of laws justified by, for instance, a woman's unique capacity for bearing children. Such an exception could reduce the standard from absolute to something less than strict scrutiny. Any classification based on sex ultimately takes into account "physical characteristics unique to one sex."[223] Brown acknowledges that this "subsidiary principle" could be used as a subterfuge for laws discriminating against one sex, and urges courts to apply strict scrutiny to laws dealing with physical characteristics unique to one sex.[224] But in *Seattle v. Buchanan*,[225] where the Washington Supreme Court used this exception to uphold an ordinance prohibiting the exposure of female breasts in public, the court required only a reasonable relationship to a legislative purpose, rather than a compelling governmental interest as required by the strict scrutiny approach suggested by Brown.[226]

Brown argued that strict scrutiny allows for too much discretion. But the experience of the Washington courts and Judge Murphy's opinion in *Burning Tree* illustrate that even under an absolute standard there is room for a great deal of judicial discretion. Such discretion may allow classifications to survive under an absolute standard that would not survive strict scrutiny. Discriminatory laws should not be permitted to circumvent the ERA by being deemed

222. *See* Brown, *supra* note 97 & notes 100-102 and accompanying text.
223. *See* Brown, *supra* note 97, at 893.
224. *Id.* at 894.
225. 90 Wash. 2d 584, 584 P.2d 918 (1978).
226. *Id.* at 591, 584 P.2d at 921.

exceptions or by being considered classifications to which the ERA is inapplicable. Such laws should be accommodated only by demonstrating a compelling state interest as required by strict scrutiny.

The absolute approach also is unnecessary. The strict scrutiny standard has served societal interests well when racial discrimination has been challenged because few classifications have survived that level of scrutiny.[227] The Washington state courts applied strict scrutiny to sex-based classifications prior to the passage of its ERA, and to give effect to the ERA, perhaps they had to impose an even higher standard of scrutiny. Maryland does not have that problem since it did not apply strict scrutiny to sex-based classifications prior to the passage of the State ERA.

Judge Eldridge's opinion in *Burning Tree* reflects a strict scrutiny approach to sex-based classifications:

> Consequently, the E.R.A. renders sex-based *classifications* suspect and subject to at least strict scrutiny, with the burden of persuasion being upon those attempting to justify the classifications. In this respect, the E.R.A. makes sex classifications subject to at least the same scrutiny as racial classifications. Of course, because of the inherent differences between the sexes some sex-based classifications may be justified after such scrutiny, whereas comparable race-based classifications could not be sustained . . . . Thus, separate restroom or locker room facilities for blacks and whites cannot be tolerated but such separate facilities for men and women can be justified by the state.[228]

This language indicates that, in Judge Eldridge's view, sex-based classifications can be justified, but that the State bears a heavy burden when it tries to do so. Since Judge Eldridge's opinion embraces strict scrutiny and Judge Murphy's suggests that the absolute standard is in some ways less strict than strict scrutiny, this note concludes that, *at most*, sex-based classifications challenged under the ERA in Maryland are subject to strict scrutiny. The strict scrutiny standard, although borrowed from federal equal protection analysis, is an appropriate standard for Maryland because it is coherent, well understood, and fulfills the mandate of the ERA.

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227. "Apparently the only instance in which 'the state has met the burden of showing a compelling state interest' justifying a racial classification in a case before the Supreme Court was in *Korematsu v. United States*, 323 U.S. 214 (1944)." Gokel, *One Small Word: Sexual Equality Through the State Constitution*, 6 FLA. ST. U.L. REV. 948, 948 n.2 (1978).

228. 305 Md. 53, 98, 501 A.2d 817, 840 (1985).

IV. CONCLUSION

In our federal system, when a state court interprets its state constitution, it should neither pointlessly diverge nor slavishly adhere to federal tests and standards applied to similar federal constitutional provisions. In the case of the Maryland ERA, the Maryland courts should borrow the strict scrutiny standard from federal equal protection analysis, but should create their own state action standard. Strict scrutiny is a well-understood and readily applied concept which aids implementation of the sweeping mandate of the ERA. It is preferable to the absolute standard which, although well intentioned, is rife with exceptions that undercut its effectiveness. While the ERA requires some state action standard, the purposes of the ERA will be ill-served by borrowing the chaotic and narrow federal model. Instead, Maryland should formulate its own state action standard—one narrow enough so as not to conflict with individual freedom of association, but broad enough to give the ERA maximum effect.

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